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No. 92-1854

IN THE

Supreme Court of the United States

October Term, 1992

KATHLEEN POOLE, as Administratrix of the Estate of DAVID POOLE,

Petitioner,

vs.

CONSOLIDATED RAIL CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

SUPPLEMENTAL BRIEF FOR RESPONDENT

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This supplemental brief is submitted pursuant to Supreme Court Rule 15.7, and in response to Petitioner's Supplemental Brief, to dispel the petitioner's argument that a recently enacted amendment to New York's discovery laws should have an impact on this Petition for Writ of Certiorari. As stated in Petitioner's Supplemental Brief, New York State law, CPLR 3101(i), now provides for the discoverability of "any films, photographs, video tapes or audio tapes . . . involving a [party]." Prior to this amendment, there was no statutory provision regarding the discoverability of these materials and, until the Court of Appeals' decision in this

case and its companion case, there has been no definitive case law on the issue. There is nothing about this recent enactment that relates in any manner to the issue currently before this Court, that is, whether review of petitioner's constitutional claim that she has been denied due process of law is merited.

The New York Court of Appeals held in *DiMichel v. South Buffalo Ry. Co.*, 80 N.Y.2d 184 (1992), the companion case to this case (and in which no similar Petition for Writ of Certiorari has been filed), that a plaintiff may discover surveillance films which a defendant intends to use at trial. Petitioner now argues to this Court that the recent amendment to New York CPLR 3101(i) abrogated that portion of the Court of Appeals' decision and is somehow evidence in and of itself that former Chief Judge Wachtler was not acting "evenhandedly" when the Court of Appeals unanimously ordered a new trial in *Poole*. Petitioner in effect argues that, by passing a discovery statute which, to some extent, expands the scope of discovery previously permitted pursuant to a court decision on the same subject matter, the state legislature has provided evidence that the court acted with improper motives. There is, of course, no basis for such an unfounded assertion.

After holding in *DiMichel* that "the plaintiff was entitled to view those tapes that the defendant intended to use at trial," (Petitioner's Appendix at 14a), the Court of Appeals then turned to *Poole* and held, among other things, that such disclosed films could not be used affirmatively by plaintiff's counsel if the defense did not use them at trial. (Petitioner's Appendix at 16a). The discovery amendment relied upon by the petitioner does not even reference the use of the materials at trial and

certainly cannot be said to abrogate that portion of the decision at issue. That portion of the Court of Appeals' decision on the issue of surveillance which formed the basis, in part, for the reversal and new trial in *Poole* was left untouched by the Legislature. Indeed, the Legislature's silence on that issue can be viewed as a ratification of the Court of Appeals' holding in that regard.

Additionally, the Court of Appeals ordered a new trial herein on the basis of additional trial errors, at least one of which was considered by the court to be "more egregious" than the petitioner's use of the surveillance materials. (Petitioner's Appendix at 16a-17a). These other trial errors had nothing whatsoever to do with surveillance and are certainly not addressed by the recently enacted amendment.

Thus, it is clear that the discovery amendment on which the petitioner now relies is not at all determinative—or even relevant—to the issue currently before this Court. It raises no new constitutional or other novel issues of law.

CONCLUSION

For these reasons, and the reasons set forth in Respondent's Brief in Opposition, the Petition for Certiorari of Kathleen Poole, as Administratrix of the Estate of David Poole, should be denied.

Dated: September 21, 1993

Respectfully submitted,

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